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No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, ET AL., IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,[1] on behalf of the National Education Association ("NEA") and 34 of its affiliated state education associations;[2] the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") and its affiliated national unions the American Federation of Teachers ("AFT") and the American Federation of State, County, and Municipal Employees ("AFSCME"); and the Service Employees International Union ("SEIU").

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

[2] The state education associations that join in this brief are Arizona Education Association, California Teachers Association, Colorado Education Association, Delaware State Education Association, Education Minnesota, Federal Education Association, Florida Education Association, Georgia Association of Educators, Idaho Education Association, Illinois Education Association, Iowa State Education Association, Kentucky Education Association, Maine Education Association, Massachusetts Teachers Association, MEA-MFT (Montana), Michigan Education Association, Missouri NEA, Mississippi Association of Educators, NEA-Rhode Island, New Jersey Education Association, New York State United Teachers, Ohio Education Association, Oklahoma Education Association, Oregon Education Association, Pennsylvania State Education Association, South Dakota Education Association, Tennessee Education Association, Texas State Teachers Association, Utah Education Association, Vermont-NEA, Virginia Education Association, Washington Education Association, West Virginia Education Association, and Wisconsin Education Association Council.

NEA is a nationwide employee organization of three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. In 2015 NEA passed a resolution that "acknowledge[d] the existence in our country of institutional racism – the societal patterns and practices that have the net effect of imposing oppressive conditions and denying rights, opportunity, and equality based on race" and dedicated itself to addressing institutional racism in schools. One key mechanism for fighting institutional racism is to provide all students, regardless of race, an equal opportunity to succeed by ensuring that public schools are racially diverse. NEA's governing policy affirms that a "racially diverse student population is essential for all elementary/secondary schools, colleges, and universities to promote racial acceptance, improve academic performance, and foster a robust exchange of ideas." Attaining such racial diversity may require "elementary/secondary schools, colleges, and universities to take race into account in making decisions as to student admissions, assignments, and/or transfers." These are likewise the views of the NEA affiliates that have joined in this brief.

AFL-CIO is the largest organization of working men and women in the United States, consisting of 56 national and international unions representing over 12 million members. Many of these members, including those of the AFL-CIO's affiliate AFT, teach or perform other essential services in universities, colleges and public elementary and secondary schools. The AFT, for example, represents over 1.5

million members who work in public education, including over 200,000 full and part time faculty, administrative staff, and graduate teaching fellows at public colleges and universities across the country. Dating back to the Court's historic desegregation decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), in which the AFT filed an *amicus curiae* brief supporting the plaintiffs, the AFL-CIO and AFT have had an enduring commitment to educational equality for all, regardless of race. AFSCME is an international labor organization representing approximately 1.6 million working men and women throughout the United States and Puerto Rico, including tens of thousands who are employed in higher education, providing important services at public colleges and universities throughout the country. AFSCME has been committed for decades to diversity and full participation, both within the union and in society as a whole, and is an advocate for diverse student bodies and equality of educational opportunity.

SEIU represents 2.1 million men and women working in health care, property services, and public services, including public school and university employees. SEIU's membership is among the most diverse in the labor movement. The union is deeply committed to the principles of equal opportunity and social, economic, and racial justice. This commitment is reflected in SEIU's Mission Statement, adopted as part of its Constitution and Bylaws, which affirms that "we must not be divided by forces of discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation or immigration status." SEIU believes that diversity

in elementary, secondary, and higher education classrooms is vitally important to achieving a society that lives up to these ideals.

The NEA, AFL-CIO, AFT, AFSCME, and SEIU recognize that virtually every student in our public schools will ultimately enter the workplace. Once there, they will be expected to honor a set of fundamental public policies, including the command that they not discriminate on the basis of race. The experience of the labor organization *amici* teaches that opportunities for students to interact with their peers from other races in the educational process—opportunities that are fostered by policies such as those at issue in this case—have substantial, positive impacts on making them better citizens in our democracy and in the workplace.

INTRODUCTION

Since 2012, the last time this case was before the Court, our national conversation on race has significantly shifted. After a year in which nine Black worshippers were massacred by an avowed white supremacist and the Black Lives Matter movement raised awareness of the mortal danger a person of color may face due to the color of their skin, the majority of Americans in 2015 now think race relations are getting worse, a significant change from more optimistic opinions in 2009.[3] Today, as large

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[3] Kevin Sack & Megan Thee-Brenan, *Poll Finds Most in U.S. Hold Dim View of Race Relations*, NEW YORK TIMES, July 23, 2015, *available at* http://www.nytimes.com/2015/07/24/us/poll-shows-most-americans-think-race-relations-are-bad.html?_r=0.

numbers of Americans believe that race *does* matter and that "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation," *Tex. Dep't. of Housing v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2525 (2015), it is more important than ever that our public education system be a mechanism for driving opportunity for all our children. *Amici* believe that racially integrated public elementary and secondary schools and institutions of higher education not only help to overcome our nation's deplorable legacy of slavery, segregation, and discrimination, but also—and more to the point in the present context—enable such schools to fulfill their dual mission of instilling in all students "the values on which our society rests," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979), and providing them with the skills and knowledge necessary to realize their full potential, *see Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972). Education remains key to achieving economic mobility and increasing the prospects for success in society, and integrated schools are the most successful way to ensure equal opportunity for all students. To accomplish those ends, educational institutions should be permitted, in certain narrowly-limited circumstances, to consider race and ethnicity when making educational policy judgments (ranging from school attendance zones to college admissions criteria) that affect the composition of schools and classrooms.

While this Court has made clear that any use of racial classifications in such decisions must satisfy "strict scrutiny," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995), so as to " 'smoke out' illegitimate uses of race by assuring that the legisla-

tive body is pursuing a goal important enough to warrant use of a highly suspect tool," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), this Court has also been clear that diversity in schools and classes, including racial and ethnic diversity, can be "a goal important enough" to warrant consideration of race in making such decisions. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007) (recognizing that the government can have a "compelling" interest in "student body diversity" at the higher education level); *id.* at 783 (recognizing that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue") (Kennedy, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

In 2013, this Court reaffirmed that attaining a diverse student body and its concomitant educational benefits is a compelling state interest. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417-18 (2013). Recent events demonstrate that this interest is stronger than ever and that the beneficial effects of diversity in schools is even more needed in order to promote "'cross-racial understanding,' help[] to break down racial stereotypes," precipitate "more enlightening" classroom discussion, promote better "learning outcomes" and "better prepare[] students for an increasingly diverse workforce and society." *Grutter*, 539 U.S. at 330. Those interests are compelling; nothing less than the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265,

313 (1978) (Powell, J.) (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

A. Ours is not a color-blind society, and race still matters. When it comes to public elementary, secondary, and higher education, racial classifications continue to carry great weight—dividing educational opportunities inequitably and distorting perceptions with stereotypes and prejudice. The mission of public elementary, secondary, and higher education is to instill in all students the values on which our society rests and to provide them all, regardless of race, with the skills and knowledge necessary to realize their full potential. That mission cannot be fulfilled without racially-diverse classrooms. Accordingly, achieving such diversity unquestionably serves a compelling state interest.

B. The societal and educational benefits of racially diverse classrooms in public elementary, secondary, and higher education are well documented. A robust body of empirical research confirms that racially diverse schools and classrooms produce tangible and lasting improvements in academic achievement for minority students, while also benefitting nonminority students. Classroom contact among students of different races also reduces stereotypes and prejudice, and has been found to be more effective in promoting tolerance and cross-racial understanding than any other pedagogical method. Classrooms with a "critical mass" of minority students help to equalize opportunity and offer enduring benefits to a multiracial, democratic society, and its citizens.

ARGUMENT

ACHIEVING DIVERSITY IN PUBLIC SCHOOLS AND INSTITUTIONS OF HIGHER EDUCATION REMAINS A COMPELLING GOVERNMENT INTEREST

Diversity—specifically, "obtaining the educational benefits that flow from an ethnically diverse student body," *Bakke*, 438 U.S. at 306—is an even more compelling interest today than it was when this Court decided *Bakke* and *Grutter*. Indeed, in just the two years since this Court decided *Fisher I*, the demographics of American society has continued to change, and we have become increasingly aware of how race shapes and determines our lives. In 2014, over 48% of children under the age of 18 were Black, Hispanic, American Indian, Native Hawaiian, or multiracial and in the next decade almost half of all children enrolled in public schools will be from one of these historical minority groups.[4] By 2044, the U.S. Census Bureau projects that Whites will no longer be a majority of the population.[5] These demographic shifts reflect an ongoing trend in which "[t]he country as a whole

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[4] U.S. Census Bureau, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060* 10 (March 2015), *available at* http://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf.; U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2015 80 (May 2015).

[5] *Projections of the Size and Composition of the U.S. Population. supra* note 4 at 10.

and the workforce in particular is becoming more, not less [racially] diverse."[6]

Yet, at the same time, the nation's public elementary and secondary schools remain highly segregated. This continuing and persistent segregation denies a large segment of our society the ability to achieve their potential and move up the economic ladder. The most serious segregation affects Black and Hispanic students: 80% of Hispanic students and 74% of Black students attend majority-minority schools, with approximately two of every five students in both of these populations in intensely segregated schools with zero to 10% white enrollment.[7]

Institutions of higher education thus confront a choice in making admissions decisions. They can ignore the persistent inequalities in the elementary and secondary school systems that segregate students by race, depriving all students of an education enriched by exposure to diversity. Or, they can take that reality into account in some limited and measured way by, for example, considering racial and ethnic background as one of many factors used in admitting a

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[6] Julie F. Mead, *Conscious Use of Race As a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived from Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 134-35 (2002).

[7] Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus . . . Separation* 19 (Sept 2012), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf.

truly diverse student body. We detail below why institutions have a compelling interest in choosing the latter course in order to fulfill their two interrelated, paramount purposes—instilling in all students "the values on which our society rests," *Ambach*, 441 U.S. at 76, and providing them with the skills and knowledge necessary to realize their full potential by "expand[ing] their knowledge, broaden[ing] their sensibilities, kindl[ing] their imagination, foster[ing] a spirit of free inquiry, and increas[ing] their human understanding and tolerance," *Yoder*, 406 U.S. at 239.

A substantial body of empirical evidence indicates that racially diverse classrooms contribute significantly to the achievement of both of these purposes. Learning in a racially diverse setting furthers students' cognitive and intellectual development, thus providing an important educational benefit to students of every race. Diverse classrooms also teach students to judge others as individuals, rather than according to stereotypes and prejudices. These benefits provide a powerful catalyst toward integration over the course of a student's lifetime.

To place that showing in perspective, however, it is crucial to begin with an understanding of the stark reality that the nation's educational opportunities continue to be inequitably apportioned by race. Based largely on the color of a student's skin, we can largely predict what kind of schools that student will attend, how well that student will be prepared for college, whether that student will obtain higher education, and what that student's prospects are in the workforce.

A. The Inequitable Apportionment of Educational Opportunities by Race

We doubt that there is anyone connected with these cases—on either side—who does not share the goal of attaining a society in which, in the words of Martin Luther King, Jr., our children "will not be judged by the color of their skin, but by the content of their character." However, we still have a long way to go to realize Dr. King's dream. Racial classifications continue to carry great weight in our country, dividing educational opportunities inequitably, denying large swaths of our populace the opportunity to succeed, and distorting perceptions with stereotypes and prejudice.

1. A student's race is, by itself, largely predictive of the racial composition of the elementary and secondary schools he or she will attend. In the 2011-2012 school year, the average White student attended a majority White school, while the average Black or Hispanic student attended a majority-minority school.[8] The segregation in Texas public schools—where white students comprise only 8.1% of all students in Houston Independent School District, 4.6% of students in the Dallas Independent School District, and only 1.9% of students in San Antonio Independent School District—is emblematic of the segregation experienced by public school students across the country.

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[8] Gary Orfield & Erica Frankenberg, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future* 12 (May 2014), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf.

See Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 650-53 & n.98 (5th Cir. 2014). Overall, while more than half of all Black (51.5%) and Hispanic (57.3%) public elementary and secondary students attended public schools in which minority enrollment was at least 75%, only 3.3% of White students attended such schools.[9] Conversely, only 7.9% of Black students and 7.3% of Hispanic students attended public schools in which the enrollment was at least 75% White, while 62.2% of White students attended such schools.[10]

The magnitude of the problem is drawn into its sharpest relief in public schools that have 99-100% non-White enrollment. In the 2009-2010 school year, these schools enrolled approximately 2.78 million Black and Hispanic public school students.[11] Nationwide, these schools enrolled roughly one-sixth of all Black students and one-ninth of all Hispanic students.[12] In the nation's largest metropolitan areas, more than one-third of Black students and about one-fifth of Hispanic students attended these profoundly racially isolated schools.[13]

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[9] U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2009 198 (June 2009).

[10] THE CONDITION OF EDUCATION 2009, *supra* note 9 at 199.

[11] *E Pluribus . . . Separation*, *supra* note 7 at 19.

[12] Gary Orfield & Erica Frankenberg, *The Last Have Become First: Rural and Small Town America Lead the Way on Desegregation* 7 (2008), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/the-last-have-become-first-rural-and-small-town-america-lead-the-way-on-desegregation/frankenberg-last-have-become-first-2008.pdf.

[13] *Id.*

This extreme segregation of Black and Hispanic students into majority-minority schools is increasing. From the 1990-1991 school year to the 2006-2007 school year, the enrollment for Black students in schools with a student body comprised of at least 75% minority students increased by nearly seven percentage points (from 44.8% to 51.5%); over the same time period, the figure for Hispanic students increased by more than six percentage points (from 50.9% to 57.3%).[14] Data from the 2009-2010 school year shows continuing segregation and that "there was no sign at all of desegregation progress for [Hispanic] students, who became steadily more isolated."[15]

2. The trend toward higher levels of concentrated segregation for Black and Hispanic students has ramifications beyond just racial isolation. At present, "almost all intensely segregated minority schools, but very few all-white schools, are associated with concentrated poverty."[16] Among all public school students in the 2009-2010 school year, approximately 37% of both Black and Hispanic students attended high-poverty schools (defined as public schools where 76% or more students are eligible for the free or reduced-price lunch), while less than 6% of White students attended such schools.[17] This effect is even more pronounced in large urban areas, where 48% of

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[14] THE CONDITION OF EDUCATION 2009, *supra* note 9, at 200.

[15] *E Pluribus . . . Separation*, *supra* note 7 at 18.

[16] *Id.* at 27.

[17] U.S. Dep't of Educ., THE CONDITION OF EDUCATION 2012 172 (May 2012).

Black and nearly 46% of Hispanic students attend high-poverty schools.[18]

Students in these high-poverty, majority-minority schools often lack adequate access to the necessary components of a high-quality education, with less access to Advanced Placement (AP) courses, gifted and talented programs, and classes in calculus, physics, algebra II, and chemistry compared to schools with fewer Hispanic and Black students.[19] Furthermore, although educational research has shown the critical importance of a stable, high-quality teaching force,[20] high-poverty, majority-minority schools are more likely to be associated with high rates of teacher turnover and fewer experienced teachers.[21] For example, fully certified mathematics and science teachers are more prevalent in low-

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[18] *Id.* at 173.

[19] U.S. Dep't of Educ., *Dear Colleague Letter* 3 (October 1, 2014), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf; U.S. Dep't. of Educ., *The Transformed Civil Rights Data Collection* 1 (March 12, 2012), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf; U.S. Dep't of Educ., *Civil Rights Data Collection: Data Snapshot: College and Career Readiness* 1 (March 21, 2014), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/crdc-college-and-career-readiness-snapshot.pdf.

[20] Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1, 31-33 (2000).

[21] C. Kirabo Jackson, *Student Demographics, Teacher Sorting and Teacher Quality: Evidence from the End of School Desegregation*, 27 J. LAB. ECON. 213, 247-49 (2009); *The Transformed Civil Rights Data Collection*, *supra* note 19 at 10.

minority schools than in high-minority schools, and fully certified science teachers are more prevalent in low-poverty schools than in high-poverty schools.[22] And more generally, schools with the largest numbers of low-income and minority students are much more likely than other schools to fill vacancies with substitutes or teachers who are not fully certified or are instructing classes in which they are not certified, and to expand class sizes or cancel course offerings when they cannot find teachers.[23] In addition, teachers in schools with a high percentage of minority students are paid less than their colleagues in the same school district who are in schools with fewer minority students.[24]

Schools with high proportions of Hispanic and Black students invest less in school facilities compared to those attended mainly by white students. As a result, many Black and Hispanic students attend overcrowded and dilapidated schools with inadequate heating and cooling, in temporary, portable buildings or poorly maintained buildings.[25] This lack

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[22] Nat'l Sci. Bd., SCIENCE AND ENGINEERING INDICATORS 2012 1-23 (January 2012).

[23] Linda Darling-Hammond & Laura Post, *Inequality in Teaching And Schooling: Supporting High-Quality Teaching And Leadership In Low-Income Schools* in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 136 (Richard D. Kahlenberg, Ed. 2000).

[24] U.S. Dep't of Educ., *Civil Rights Data Collection: Data Snapshot: Teacher Equity* 3 (March 21, 2014), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/crdc-teacher-equity-snapshot.pdf.

[25] *Dear Colleague Letter*, *supra* note 19 at 4.

of investment extends to high-quality instructional materials and technology—Black and Hispanic students in majority-minority schools have less access to these resources compared to students in schools that are majority white.[26]

3. The result of this pervasive segregation is all too predictable. Students who attend high-poverty, majority-minority primary and secondary schools are denied the educational opportunities given to those in majority White schools resulting in poorer educational outcomes and a lack of preparation for higher education and work. The most obvious measure of this is that Hispanic and Black students are far more likely than White students to drop out of high school: in 2013, the dropout rate was 12% for Hispanic students and 7.0% for Black students, as compared to 5% for White students.[27]

In addition, Hispanic and Black students are far less likely to pursue higher education. In 2012, about 44% of White 18 to 24-year-olds were enrolled in colleges and universities, as compared to 36.4% of Blacks and 37.5% of Hispanics in the same age cohort.[28] Those Blacks and Hispanics who do pursue higher education are far less likely to enroll in a four-year college program: in 2011, 44.6% of Hispanic college students and 34.5% of Black college students were

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[26] *Id.*

[27] THE CONDITION OF EDUCATION 2015, *supra* note 4, at 179.

[28] National Center for Education Statistics, 2014 Digest of Education Statistics 2013, Table 302.60, *available at* http://nces.ed.gov/programs/digest/d13/tables/dt13_302.60.asp. .

enrolled in 2-year colleges, compared to just 29.6% of White college students.[29]

These inequities are only growing worse. Between 1990 and 2014, the gap between Blacks and Whites in the percentage of 25- to 29-year-olds who had attained a bachelor's degree or higher increased by 6 percentage points, from 13% to 19%; and the gap between Whites and Hispanics increased by 8 percentage points, from 18% to 26%.[30]

4. The fact that Black and Hispanic students are more likely to attend high-poverty, racially-isolated schools, which in turn often leaves them less prepared to pursue higher education, has dire consequences for their prospects for success in the workforce. Black and Hispanic adults face persistently higher rates of unemployment than their White counterparts,[31] with much of that unemployment concentrated among those with a high school diploma or less.[32]

The wage gap between college and high school graduates is at a historical peak.[33] The median week-

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[29] U.S. Census Bureau, *School Enrollment in the United States: 2011* 8 (Sept. 2013), *available at* http://www.census.gov/content/dam/Census/library/publications/2013/demo/p20-571.pdf.

[30] THE CONDITION OF EDUCATION 2015, *supra* note 4, at 34.

[31] U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 378 (2012).

[32] *Id.* at 404.

[33] Pew Research Center, *The Rising Cost of Not Going to College* 3 (Feb 11, 2014), *available at* http://www.pewsocialtrends.org/files/2014/02/SDT-higher-ed-FINAL-02-11-2014.pdf.

ly earnings of a bachelor's degree holder in 2011 were 64 percent higher than those of a high school graduate.[34] College graduates are more consistently employed than high school graduates; they also receive more generous nonwage fringe benefits, including sick and vacation pay, employer-paid health insurance, pension contributions, and safe and pleasant working conditions.[35] The rising relative earnings of college graduates are not just due to rising real earnings for college-educated workers, but also to falling real earnings for non-college-educated workers.[36] To put the point plainly, this empirical evidence shows that inequitable opportunities for education at the elementary and secondary level have profound and lasting negative implications for students for the rest of their lives.

5. Even minority students who have the same formal educational opportunities as White students may, due to their race, still have negative educational and workforce experiences. People—even children—have been found to react to individuals differently based on their racial perceptions. For example, a 1995 study found that children, when asked to read a list of names and decide whether the named individuals were politicians or criminals, were more likely

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[34] U.S. Dep't of Educ. & U.S. Dep't of Treas., *The Economic Case for Higher Education* 1 (June 21, 2012).

[35] David Autor, *The Polarization of Job Opportunities in the U.S. Labor Market* 5 (April 2010), *available at* http://www.americanprogress.org/issues/2010/04/pdf/job_polarization.pdf.

[36] *Id.* at 6; *The Rising Cost of Not Going to College*, *supra* note 33 at 7-8.

to decide that names typically associated with Black Americans were the names of criminals.[37]

These preconceptions carry through to adulthood and the workplace. In 2004, researchers studied racial discrimination in the labor market by sending fictitious resumes to employers with randomly-assigned names statistically associated with Black or White individuals. White-associated names led to 50% more callbacks for interviews—a racial gap that was uniform across occupation, industry, and employer size.[38]

In sum, ours is not a color-blind society, and race still matters. When it comes to public elementary and secondary education, minority and nonminority students of equal ability do not, in the aggregate, have equal opportunities. This lack of equal opportunities hampers the ability of many students to succeed in higher education and the workforce. In light of this inescapable fact, the mission of public elementary, secondary, and higher education cannot be fulfilled without affirmative efforts to achieve racially diverse classrooms. Such racial diversity in the classroom, as we now show, contributes significantly to the fulfillment of the public educational mission.[39]

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[37] Connie T. Wolfe & Steven J. Spencer, *Stereotypes and Prejudice: Their Overt and Subtle Influence in the Classroom*, 40 AM. BEHAV. SCIENTIST 176, 178 (Nov./Dec. 1996).

[38] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

[39] Our use of the term "racially diverse classrooms"—as opposed to such alternative terms as racially diverse student

B. The Educational and Societal Benefits of Racially Diverse Classrooms

As grim as this portrait of persistent racial disparity and *de facto* segregation may be, there are solutions that we, as a society, can pursue to address it. An impressive body of empirical research has shown that fostering racially diverse classrooms is a fundamental and necessary step in closing minority achievement gaps and promoting productive intergroup relations in society at large.

1. Even when one controls for parental income, education, and other measures of socioeconomic status, there are persistent racial gaps in achievement and other educational outcomes.[40] These gaps—particularly in student test scores—have narrowed during periods coinciding with greater school integration;[41] conversely, the more recent period of stagnation in progress toward narrowing these gaps

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bodies or racially integrated schools—is not without purpose. Merely placing minority and nonminority students in the same school does not in itself necessarily create the conditions for beneficial interactions among students of different races. *See* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 333 (2002).

[40] Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 998 (2010).

[41] *Id.* at 1010 (citing Mark Berends & Roberto V. Peñaloza, *Increasing Racial Isolation and Test Score Gaps in Mathematics: A 30-Year Perspective*, 112 TEACHERS COLL. REC. 978, 988-91 (2010)).

corresponds with a period when desegregation has effectively stalled or been reversed.[42]

Much social science research documents the influence of segregation on disparities in mathematics achievement, where racial gaps persist irrespective of socioeconomic factors.[43] As a whole, this body of research unambiguously finds that racial diversity in classrooms positively affects Black students' math achievement,[44] and, conversely, that racial segregation negatively affects their mathematics performance.[45] This research also provides strong evidence that segregation undermines mathematics achievement among Hispanics and moderately strong evidence that attending diverse schools fosters it.[46] Indeed, these studies even provide strong evidence that racial isolation negatively affects the achievement of Whites and that attending diverse schools

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[42] *Id.*

[43] *Id.* at 998.

[44] *Id.* at 1032 & n.150 (collecting studies). *See also* Bernadette Gray-Little & Robert A. Carels, *The Effect of Racial Dissonance on Academic Self-Esteem and Achievement in Elementary, Junior High, and High School Students*, 7 J. RES. ON ADOLESCENCE 109, 123, 125-26 (1997) (finding that Black and White 11th graders had the highest achievement levels at racially balanced schools and that school racial composition exerted a more powerful influence on Black student performance than it did on White student performance).

[45] Mickelson & Bottia, *supra* note 40, at 1032 & n.151 (collecting studies) *See also* Berends & Peñaloza, *supra* note 41, at 992-93.

[46] Mickelson & Bottia, *supra* note 40, at 1034 & nn.162-63 (collecting studies).

does not harm their mathematics achievement.[47] Together, these findings provide consistent and unambiguous evidence that math learning in a racially diverse classroom is positively related to outcomes for most students—irrespective of the student's age, race, or socioeconomic status.[48]

Segregated majority-minority schools are, as discussed earlier, frequently high-poverty schools with fewer resources and funding than majority white schools, which research shows leads to a negative impact on students' reading and verbal achievement. For example, one recent study found that attending a highly segregated, majority Black school has a "profound" negative effect on a student's verbal achievement, "above and beyond" the effects of a student's own poverty level or racial group.[49] Another study found that, as a majority-minority school became more and more segregated, average monthly reading gains among first-graders slowed by two-thirds, with the negative association between classroom composition and reading growth being strongest for Black students.[50]

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[47] *Id.* at 1033-34 & nn.156-60 (collecting studies). *See also* Gray-Little & Carols, *supra* note 44, at 123, 125-26.

[48] Mickelson & Bottia, *supra* note 40, at 1043. *See also* Xiaoxia A. Newton, *End-of-High-School Mathematics Attainment: How Did Students Get There?*, 112 TEACHERS COLL. REC. 1064, 1087-88 (2010).

[49] Geoffrey Borman & Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data*, 112 TEACHERS COLL. REC. 1201, 1236-39 (2010).

[50] James Benson & Geoffrey Borman, *Family, Neighbor-*

Integrated school environments are also more effective than segregated ones in helping students graduate. For example, a study of public school students in Cleveland showed that Black, Hispanic, and White students had lower drop-out rates when attending diverse high schools—and that this effect intensified if the students were exposed to diverse school environments before high school.[51] In other words, a diverse school environment "turn[s] the average high school into an institution that cushions more effectively the negative effects of intensifying non-school problems on graduation chances."[52]

The impact of integrated schooling is significant and long-lasting. A recent study followed the life-trajectories of children born between 1945 and 1968 until 2013 and found that Black students who attended desegregated schools were more likely to graduate from high school, go to college, and earn a degree than those who attended segregated schools.[53] They also made more money: five years of

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hood, and School Settings Across Seasons: When Do Socioeconomic Context and Racial Composition Matter for the Reading Achievement Growth of Young Children? 112 TEACHERS COLL. REC. 1338, 1371, 1374-75 (2010).

[51] Argun Saatcioglu, *Disentangling School- and Student-Level Effects of Desegregation and Resegregation on the Dropout Problem in Urban High Schools: Evidence From the Cleveland Municipal School District, 1977-1998*, 112 TEACHERS COLL. REC. 1391, 1419, 1427 (2010).

[52] *Id.* at 1429.

[53] Rucker C. Johnson, Long-Run Impacts of School Desegregation & School Quality on Adult Attainments 2, 18-20, National Bureau of Economic Research, Working Paper

integrated schooling increased earnings by 15 percent.[54] Blacks who attended integrated schools were also less likely to be incarcerated and were healthier as adults.[55] Notably, attending a racially diverse school had no negative effect on White students.[56] Overall, the research on the impact of racial diversity in schools demonstrates that if we are to have a society in which children of all races are allowed to realize their academic and intellectual potential, that goal can only be reached by permitting policies that foster racial diversity in elementary, secondary, and higher education.

2. Beyond the well-documented educational benefits of racially diverse classrooms, there are broad societal benefits to be realized from the interracial contact that comes with diverse classroom environments. The theory that interracial contact reduces racial stereotypes and prejudice was first articulated by Gordon W. Allport in his seminal work, THE NATURE OF PREJUDICE. Allport posited that racial isolation breeds stereotypes and prejudice, and that "equal status contact between majority and minority groups in the pursuit of common goals" is a critical ingredient in improving relations between members of those groups, especially if such contact "is of a sort that leads to the perception of common

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16664 (Revised September 2015), *available at* http://www.nber.org/papers/w16664.pdf.

[54] *Id.* at 20-21.

[55] *Id.* at 2, 22-23.

[56] *Id.* at 2, 18.

interests and common humanity between the members of the two groups."[57]

Subsequent empirical research has repeatedly and consistently confirmed the common-sense conclusion that interracial contact can combat stereotypes and prejudice and make individuals more comfortable relating to members of other racial groups.[58] This research makes plain, however, that the conditions of contact are critical to its impact. In the first place, contact that occurs during key periods of personal development—for example, in a student's formative years—and that frequently recurs, is far more effective at promoting tolerance and cross-racial understanding than intermittent contact among persons whose social beliefs and identities are fully formed.[59]

So too, contact with a broad spectrum of different people of another race is more effective in breaking

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[57] Gordon W. Allport, THE NATURE OF PREJUDICE 281 (1954).

[58] *See* Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L. J. 1, 19, 23-24 (2000) ("[The [contact] hypothesis has been tested, and has usually been confirmed, in a large number of empirical studies using many different methodologies—field studies, survey research, and laboratory experiments—in a wide range of settings.").

[59] Such crucial stages of development include not only the college years (of those individuals who advance to that educational level) but, more broadly, children's very earliest educational experiences. *See* Susanne E. Dutton et al. *Racial Identity of Children in Integrated Predominantly White, and Black Schools*, 138 J. OF SOC. PSYCHOL. 41, 42 (1998); Richard R. Scott & James M. McPartland, *Desegregation as National Policy: Correlates of Racial Attitudes*, 19 AM. EDUC. RES. J. 397, 399 (Fall 1982).

down racist and prejudicial attitudes than contact with just a few individuals of another race, because it forces people to "decategorize" those with whom they are dealing and to treat them as individuals rather than simply as members of a particular racial group.[60] This finding highlights the importance of having a "critical mass" of minority students. A "variety of viewpoints among minority students"[61] helps to break down racial stereotypes, and "nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."[62] This requires a sufficiently diverse group of experiences and perspectives within minority groups in order to counteract racial stereotypes and achieve the educational benefits of diversity. A recent study of Black male college students noted that the Black students "recognized that members of other racial/ethnic groups might perceive the Black student population as a monolithic group" but that they themselves "were quite cognizant of the characteristics and experiences that made them unique and distinctive from each other" such as coming from a predominantly White area or a predominantly Black area.[63]

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[60] See Marilynn B. Brewer & Norman Miller, *Contact and Cooperation: When Do They Work?*, in ELIMINATING RACISM: PROFILES IN CONTROVERSY 315, 318-20 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988).

[61] *Grutter*, 539 U.S. at 320.

[62] *Id.* at 319-20.

[63] Shaun R. Harper & Andrew H. Nichols, *Are They Not All the Same? Racial Heterogeneity Among Black Male Undergraduates*, Journal of College Student Development 204 (May/June 2008).

Accordingly, in order to disrupt stereotypes of minority students as being a monolithic group with the same experiences, perspectives, and interests, Respondent looks at race as one factor among many in order to ensure a "critical mass" of students with diverse backgrounds. By doing so, Respondent has the ability to admit high-achieving minority students with unique experiences and interests, such as a desire to major in a program that has a historical underrepresentation of minorities, and that enriches the educational environment for all students.

Finally, in order for racial stereotypes to be effectively countered, contact must be among individuals of equal status, lest contact serve simply to reinforce rather than reduce racist attitudes and prejudices.[64] The interactions of diverse students in higher education satisfies this requirement. As this Court recognized in *Grutter*, the benefits that accrue from student-body diversity in higher education are "not theoretical but real." 539 U.S. at 330. Such diversity fosters the ability to relate to other people, cultures, and viewpoints,

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[64] Thus, for example, the mere fact that a school is integrated, standing alone, does not ensure improved cross-racial relations among students. Rather, the nature and number of interracial interactions in which students engage are the determinative factors. *See, e.g.*, Janet Schofield, BLACK AND WHITE IN SCHOOL: TRUST, TENSION, OR TOLERANCE? 157, 176-81 (1981) (reporting that desegregation alone generated "a definite, but relatively modest, improvement in relations between black and white students" but that cooperative activities among black and white students generated more significant improvements).

which in turn holds tremendous value for our economy, military, and society at large. *Id.* at 330-33.

Given these findings, it is not surprising that interracial cooperative contact among students of different races in our public schools has repeatedly been linked with increased levels of tolerance for children of other races,[65] and increased likelihood that children of different races will become and remain friends.[66] Such one-on-one contact has been found to be more effective in promoting racial tolerance and cross-race interaction than any other pedagogical method—including a multicultural curriculum.[67] Moreover, such contact has been linked to the formation of "close, reciprocated [interracial] friendship choices, the kind of friendships that should be [the] most difficult to change,"[68] and which social sci-

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[65] For example, a 1998 study reports that white fourth graders in a predominantly white school were less likely than white fourth graders in integrated schools to choose a picture of a black child as someone with whom they wanted to be friends, and were more likely than the white students in the integrated schools to choose the picture of the black child as representing the child-among an array of pictures of children-that they disliked most. *See* Dutton, *supra* note 59, at 48.

[66] Robert E. Slavin, *Cooperative Learning: Applying Contact Theory in Desegregated Schools*, 41 J. Soc. Issues 45, 53, 59 (1985).

[67] *See* Yehuda Amir, *The Role of Intergroup Contact* in Change of Prejudice and Ethnic Relations, in Towards the Elimination of Racism 240, 260, 266, 281 (Phyllis A. Katz ed., 1976).

[68] Slavin, *supra* note 66, at 55, 59 (1985).

entists have long viewed "as one of most potent agents" for promoting racial tolerance.[69]

In the end, this process—far from resulting in racial balkanization—leads to precisely the opposite result. Cooperative interaction between different groups "induces members [of different groups] to conceive of themselves as one (superordinate) group rather than as two separate groups, thereby transforming their categorized representations from us and them to a more inclusive we."[70]

3. Teaching elementary and secondary school students to treat people as individuals and to identify common ground is of great consequence to their intellectual development. Heterogeneous groups—including groups that differ only with respect to the race of the participants—are better at creative problem-solving than homogeneous groups, due to the benefits of interactions between diverse individuals.[71] Reflecting that reality, high school students who are asked whether or not racial and ethnic diversity has enhanced their educational experience

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[69] Amir, *supra* note 67, at 272.

[70] Samuel L. Gaertner et al., *How does Cooperation Reduce Intergroup Bias?*, 59 J. PERSONALITY & SOC. PSYCHOL. 692, 693 (1990).

[71] Poppy Lauretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 250 (May 1996) (summarizing "consistent empirical support" for the conclusion that heterogeneous groups-including groups that are diverse only as to race or gender-generate more creative and feasible solutions to problems than do homogeneous groups).

respond in the affirmative in overwhelming numbers.[72] Indeed, some even contend that greater classroom diversity would further improve the educational process.[73]

Other research provides further evidence of the cognitive benefits of interracial interactions in the educational context. For example, in one study, 250 high school students were asked to view a short film showing two boys (one black and one white) engaged in various activities—some positive, some negative and some ambiguous—both together and apart. The students were asked to describe what the boys had done in the film and predict what each would do in various specified situations. White stu-

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[72] Surveys of public high school students in Louisville, Kentucky and Cambridge, Massachusetts, found that over 80% of students believed that their experiences in racially and ethnically diverse high schools "ha[d] helped them to work more effectively with and to get along with members of other races and ethnic groups." Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 132 (Gary Orfield ed., 2001); The Civil Rights Project-Harvard University, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District* 7 (Jan. 2002) ("*Cambridge Study*"), *available at* http://www.eric.ed.gov/PDFS/ED462469.pdf.

[73] One white high school student voiced his view that "the AP classes would be much better with a more diverse group of students." *Cambridge Study*, *supra* note 72, at 10. A black student made a similar point, voicing his discomfort as the only black student in his AP history class because "[w]hen we have discussions about the black community, I get offended and intimidated." *Id.* at 10.

dents who had had the opportunity for more interracial classroom contact:

> (1) described [the boys] in ways that were more differentiated, more integrated, and more multivalent; (2) made predictions of the future behavior of [the boys] that were less absolute; (3) inferred the presence of attributes in [the boys] with less certainty; and (4) were less likely to perceive [the black boy] as submissive and [the white boy] as domin[a]nt.[74]

The White students' greater ability to describe the film participants in meaningful, individualized ways applied not only to their description of the black boy but to their description of the white boy as well, "suggest[ing] that interracial contact had a facilitating effect on the development of interpersonal cognitive skills in general."[75]

4. These consequences of classroom diversity have enduring benefits for a multiethnic, democratic society, and its citizens. Students who learn to interact with individuals of other races in elementary and secondary school are far "more likely to function in desegregated environments in later life. As adults, they more frequently live[] in desegregated neighborhoods, ha[ve] children who attend[] desegregated schools, and ha[ve] close

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[74] Bert Meltzer, *The Influence of the Duration of Interracial Classroom Contact on the Development of Interpersonal Cognitive Skills* 133-34 (Doctoral Dissertation, Clark University) (Ann Arbor, Mich., University Microfilms 1969, No. 69-20, 406).

[75] *Id.* at 133.

friends of the other race[s] than d[o] adults ... who had attended segregated schools."[76] They are also more likely as adults to interact with individuals of other races than are students educated in racially homogeneous schools.[77] In addition, racially diverse schools and classrooms produce students who have very high levels of comfort in dealing and working with individuals of other races in later life—which they attribute in large part to their school experiences.[78]

Conversely, researchers have found that early racial isolation, especially in schools, is significantly associated with a later expressed desire to live around people of the same race.[79] One study found that attending a segregated, predominantly Black school was influential in choosing to live in a predominantly Black neighborhood, indicating that

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[76] Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation*, 19 J. BLACK STUDIES 267, 269 (1989) (discussing results of desegregation at the elementary and secondary school level based on national survey of 12,686 individuals).

[77] *See, e.g.*, Lee Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306, 1322 (Mar. 1996); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. INTERCULTURAL REL. 1 (1990).

[78] *See Cambridge Study*, *supra* note 72, at 4, 6-7; Kurlaender & Yun, *supra* note 72, at 111, 124-25, 130.

[79] Jomills Henry Braddock II & Amaryllis Del Carmen Gonzalez, *Social Isolation and Social Cohesion: The Effects of K–12 Neighborhood and School Segregation on Intergroup Orientations*, 112 TEACHERS COLL. REC. 1631, 1649-51 (2010).

more diverse public schools "may lead in the long run to more integrated neighborhoods over time."[80] Yet another study shows strong associations between high levels of school segregation and later racial isolation in workplaces—a result that held over the long term.[81]

As the foregoing studies explain, racially diverse classrooms produce long-range benefits because they break the cycle of segregation in neighborhoods, schools, social networks, and occupations. Equally to the point, they demonstrate that by closing the door on racial diversity in schools, we open the door to further racial prejudice and discrimination by perpetuating the racial isolation that breeds such prejudice and discrimination.

5. Several of the *amici* supporting the Petitioner argue that a new body of empirical research—in particular, Richard Sander's work—critically undermines the diversity rationale this Court accepted in *Grutter*, 539 U.S. at 327-33.[82] The thrust of Sander's theory is that, because of race-conscious admission policies, minority students arrive at institutions of

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[80] Pat Rubio Goldsmith, *Learning Apart, Living Apart: How the Racial and Ethnic Segregation of Schools and Colleges Perpetuates Residential Segregation*, 112 TEACHERS COLL. REC. 1602, 1626-27 (2010).

[81] Elizabeth Stearns, *Long-Term Correlates of High School Racial Composition: Perpetuation Theory Reexamined*, 112 TEACHERS COLL. REC. 1654, 1670-74 (2010).

[82] Brief of *Amici Curiae* Richard Sander & Stuart Taylor, Jr. at 2-28; Brief of *Amici Curiae* Pac. Legal Found. et al. at 17-21; Brief of *Amici Curiae* Gail Heriot et al. at 21-33.

higher education less qualified than their White classmates, and, because of their relative lack of qualifications, they fail to achieve at the level they otherwise would at an institution matching their qualifications.[83] The narrative that emerges from Sander's work is that policies that promote racial diversity victimize their ostensible beneficiaries by setting them up to fail.

However compelling that narrative may be, it is far more fiction than fact. Unlike the robust evidence of racial diversity's many educational and societal benefits,[84] Sander's "mismatch" hypothesis does not withstand sustained scrutiny. Several critics of Sander's work have already identified key methodological flaws that—when taken into account—yield results that either undermine Sander's original conclusion or even support diametrically opposite conclusions.[85] Indeed, attempts to repli-

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[83] Richard Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 370, 449-54 (2004).

[84] *See supra* notes 43 to 81.

[85] *See, e.g.*, Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students? A Correction, a Lesson, and an Update*, 105 NW. U. L. REV. 791, 811 (2011); Beverly I. Moran, *The Case for Black Inferiority? What Must Be True If Professor Sander Is Right: A Response to A Systemic Analysis of Affirmative Action in American Law Schools*, 5 CONN. PUB. INT. L. J. 41, 58 (2005); Michele L. Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1910 (2005); David Chambers et al., *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics,"* UNIV. OF MICH. LAW SCHOOL PROGRAM IN LAW AND ECONOMICS WORKING PAPER NO. 60 at 52-53 (2006).

cate Sander's results using different analytic approaches (rather than simply re-running Sander's analyses on the same data) have thus far failed.[86] Sander's research therefore fails one of the most basic criteria of reliable social science, which is that others can replicate its results and confirm its hypothesis using different data and methodologies.[87]

In any event, the notion that some Black and Hispanic students might arrive at college or law school less prepared to excel than their White colleagues does *not* support the overruling of *Grutter* or the dismissal of diversity as a compelling governmental interest. Quite to the contrary, the facts that we have laid out—which show that integrated education at the elementary and secondary level improves minority educational outcomes and preparedness for college—argue for allowing educational institutions at all levels to have *more*, not less, leeway to adopt policies that create racially diverse classrooms and learning environments. The fostering of such environments is, as the research has shown, a "necessary

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[86] *See, e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1853 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1888-91 (2004); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE. L. J. 1997, 2004 (2005).

[87] *See* Barbara Schneider, *Building a Scientific Community: The Need for Replication*, 106 TEACHERS COLL. REC. 1471, 1473 (2004) ("Without convergence of results from multiple studies, the objectivity, neutrality, and generalizability of research is questionable.").

condition[]" for the success of other educational policies that will improve minority academic achievement and the healthy intergroup relations that characterize a flourishing society.[88]

6. This brief has focused primarily on public elementary and secondary education, and even in that context only on the first prong of the strict scrutiny test—*i.e.*, the value of racially diverse classrooms—as opposed to the "narrow tailoring" prong. The enormous societal value of diversity in the elementary and secondary setting does not detract from its importance in the higher education setting. Indeed, it is precisely *because* elementary and secondary education remains so segregated and that segregation is increasing, that the societal interest in achieving diversity in higher education is all the more compelling. Most students—of all races—come to college without the benefits of cross-racial interactions at earlier stages of their educations. Thus, higher education is often the first chance to gain an opportunity to achieve the educational benefits of diversity.

Furthermore, even if we were to devote our efforts as a society to creating more diverse classrooms in elementary and secondary education, interventions in higher education would remain necessary in the short- to medium-term because any

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[88] *See* National Academy of Education, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases* 45 (2007), *available at* http://www.naeducation.org/cs/groups/naedsite/documents/webpage/naed_080863.pdf.

serious efforts to address a lack of diversity in elementary and secondary education will take time to become effective and certainly will not reach students entering college now.

Finally, the contention by Petitioner and the supporting *amici* that plans guaranteeing admission to a fixed percentage of graduating seniors from each high school in the state are a race-neutral alternative that ensures racially diverse classrooms is false. Quite apart from the practical problem of how such programs could be applied by institutions—whether kindergartens or law schools—that do not draw their students from a particular universe of feeder schools, such percentage plans at the higher education level depend entirely on the existence of segregated high schools, which in turn is bottomed on continued residential segregation. As this Court recognized just last term, the "vestiges [of *de jure* residential segregation by race] remain today, intertwined with the country's economic and social life." *Tex. Dep't. of Housing v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2515 (2015); *see also Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting); *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J. dissenting). "It is race consciousness, not blindness to race, that drives such plans." *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J. dissenting). These plans may also create perverse incentives that "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." *Gratz*, 539 U.S. at 303 n.10.

Although percentage plans can create some measure of diversity, institutions of higher education

should not be required, in order to achieve the constitutionally permissible goal of racial diversity, to resort solely to means that rely on segregation in elementary and secondary schools.

* * *

The sum of the matter is this: if we are to "hasten the day when 'we are just one race,'" *Adarand Constructors*, 515 U.S. at 275 (Ginsburg, J., dissenting), we must ensure that our children are educated in the racially diverse settings that equalize opportunity and produce significant societal and educational benefits. Accordingly, educational institutions—at the elementary, secondary, and higher education levels—should be allowed to give some consideration to race in order to achieve such diversity. This is not an "illegitimate use[] of race," *J.A. Croson Co.*, 488 U.S. at 493, but rather is fully justified under the standard of strict scrutiny by society's compelling interest in the education of all of its children.

CONCLUSION

The judgments of the court of appeals—which uphold Respondent's limited consideration of race as one of many factors in making admissions decisions—should be affirmed.

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